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IN THE

Supreme Court of the United States.

No. . Term, 19 .

SARAH ALLISON PAINTER, ADMINISTRATRIX OF THE ESTATE OF EDWIN D. PAINTER, DECEASED, LOREN E. TIMBS, ADMINISTRATOR OF THE ESTATE OF JOHN LAMBERT TIMBS, DECEASED, AND LESLIE F. HAYNIE, ADMINISTRATOR OF THE ESTATE OF WILLARD TOLSON HAYNIE, DECEASED,

Petitioners,

v.

SOUTHERN TRANSPORTATION COMPANY.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of SARAH ALLISON PAINTER, Administratrix of the Estate of EDWIN D. PAINTER, Deceased, LOREN E. TIMBS, Administrator of the Estate of JOHN LAMBERT TIMBS, Deceased, and LESLIE F. HAYNIE, Administrator of the Estate of WILLARD TOLSON HAYNIE, Deceased, respectfully shows to this Honorable Court, as follows:

A. SUMMARY STATEMENT OF THE MATTER INVOLVED.

These are actions for war risk insurance on behalf of the next-of-kin of three deceased seamen, who lost their lives at sea as a result of an attack by an enemy submarine. The claims are grounded upon the orders of the Maritime War Emergency Board, which was created under the following circumstances.

Immediately after the outbreak of World War II, the United States Government took cognizance of certain dis-

putes between labor and industry in the maritime field which threatened to interfere with the efficient and uninterrupted operation of the Merchant Marine. One of the most serious points of contention was that relating to war risk insurance. In order to prevent these disputes from developing into any interruption in the maritime service, which was so essential for the national security, the Government, through the Maritime Commission and the Department of Labor, called a meeting between labor and industry for the purpose of arriving at some solution which would eliminate the friction between the employers and employees. As a result of that conference a "Statement of Principles" (Ex. 3) was drafted by all of the parties, pledging not to engage in any strikes or lockouts for the period of the war, and requesting the President of the United States to appoint a Board with the power to impose a uniform system of war risk insurance to cover the "entire nation and the entire industry".

Pursuant to this joint petition, the President issued a proclamation on December 19, 1941 (8 Fed. Reg. 3385), creating the Maritime War Emergency Board and he specifically vested it with the powers requested in the statement of principles. The first order promulgated by the Board on December 22, 1941 required "each member of the crew of any merchant vessel documented under the laws of the United States and covered by the statement of principles, pursuant to which the Board has been established, shall be insured against loss of life due to risks of war or warlike operations in the amount of $5,000.00". It is petitioner's contention that this order of the Board imposed a binding legal obligation upon the entire industry to provide war risk insurance for the seamen.

The facts upon which the claims in the instant cases are based may be stated briefly as follows.

On March 30, 1942, respondent dispatched its seagoing tugboat "Menominee" to tow three barges laden with coal and lumber from the port of Norfolk, Virginia

to a New England port. The flotilla proceeded through the minefields out of Chesapeake Bay and then directed its course northwardly along the East Coast of the United States. About 2:30 A. M. o'clock the following morning, the tugboat was suddenly attacked by gunfire from a surfaced enemy submarine, and after a vain attempt to escape, the crew were ordered to abandon ship when it was apparent that the tugboat was lost. There being no life rafts aboard the vessel, and being unable to launch the lifeboat, the men were compelled to cling to a piece of buoyancy apparatus in the water. They soon became paralyzed in the icy cold water and one by one they died and drifted away, with the exception of two men who were subsequently rescued after being observed by aircraft overhead. The three decedents here were among the sixteen who perished in the water (R. 45, 46).

The Opinion of the District Court.

The District Judge dismissed the claims for war risk insurance and held that the "Statement of Principles" was merely an agreement between those parties who were signatory to it, and any recovery could, therefore, be made only as a matter of contract, not as a matter of legal right.

The Opinion of the Court of Appeals.

The Court of Appeals affirmed the judgment of the District Judge and likewise held that the orders of the Board did not impose any legal obligation, but were binding only upon the signatories to the "Statement of Principles". In arriving at its decision, the Court of Appeals considered as the decisive and controlling factor the unofficial interpretation rendered by the Board members as to their own jurisdiction. The Court below declined to accept the interpretation of the General Counsel of the Maritime Commission, which was primarily responsible for the creation of the Board in the first instant.

Questions Involved.

The sole issue before this Court is whether the orders of the Maritime War Emergency Board created a legal and mandatory obligation upon the operators of all vessels documented under the laws of the United States for war risk insurance, or whether those orders were binding only upon those who were parties signatory to the "Statement of Principles" as a matter of contract.

B. REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

First: The circumstances leading to the creation of the Board, the phraseology employed in the "Statement of Principles" and the Presidential proclamation, all clearly negative any suggestion that the Board was created by a contract between labor and industry and that its orders should be binding only as a matter of contract. On the contrary, it is clearly indicated that both labor and industry pledged the Government to refrain from any strikes and lockouts during the period of the emergency, in exchange for which the Government undertook to impose a mandatory obligation which was to be uniformly applied throughout the entire nation and industry. That this obligation was to be imposed as a matter of law was made clear by the legislative counsel for the Maritime Commission before a Congressional Committee. The Court below declined to accept the interpretation of this responsible representative of the Maritime Commission, but adopted instead and considered as controlling an opinion rendered by the members of the Board, which was unofficial in character, without any hearing as required by the "Statement of Principles", and drafted by a member of the staff of the Board, who was unfamiliar not only with the circumstances under which the Board was created, but also with the "Statement of Principles" itself, which set up the procedure to govern such decisions of the Board. The Court of Appeals was therefore clearly in error in considering

as controlling the unofficial interpretation rendered by the unqualified staff member to the exclusion of the considered testimony of the legislative counsel of the Maritime Commission, which agency was primarily responsible for the creation of the Board and the scope of its jurisdiction and powers.

SECOND: The Court of Appeals erred in construing the "Statement of Principles" as an agreement between labor and industry when it clearly appears from the face of that document itself that it is merely a petition by the parties signatory calling upon the President of the United States to impose a uniform obligation upon the entire industry.

THIRD: The decision of the Court below would have the effect of discriminating against a very substantial number of seamen who were in the employ of those steamship companies who were not parties signatory to the "Statement of Principles". Throughout the period of the emergency, a great many of the American shipowners were operating their vessels under time charter or other arrangements wtih the Government, and were not parties signatory to the "Statement of Principles". Under the decision of the Court below, the seamen upon these vessels would have no right to war risk insurance, notwithstanding the fact that they may have been sailing in the same waters and even in the same convoys with other vessels whose seamen were covered by the orders of the Board. This view is entirely contrary to the expressed purpose set forth in the "Statement of Principles" that a uniform obligation should be imposed upon the entire industry.

FOURTH: The decision of the Court below is in direct conflict with the decision of the District Court of Texas in the case of *Gulf Oil Corporation v. Lastrap,* 48 F. Supp. 947, and with the case of *Jones v. Atlantic Refining Company,* 55 F. Supp. 17 by the District Court for the Eastern District of Pennsylvania, both of which cases held that the Board was created by a Presidential proclamation and im-

posed a compulsory and uniform system of war risk insurance and war bonus to govern all vessels documented under the laws of the United States.

FIFTH: The seamen gave their no strike pledge to the Government in the firm belief that the Government would take steps to impose a uniform obligation upon the entire industry for war risk insurance. The decision of the Court of Appeals would indicate that the Government did not, in fact, take any measures to impose such an obligation, but left the parties to their own resources. Such a view would attribute to the Government an intention to mislead the seamen into giving a no strike pledge. This was clearly not the intention of the Government, as may be evidenced, inter alia, by the statement in the Presidential proclamation that the Board "shall" have the powers enumerated in the "Statement of Principles" to cover the entire industry.

The principle of law involved in this case is of great importance to all of the seamen in the Merchant Marine, since, at one time or another, they may serve on some vessel which is operated by a non-signatory to the "Statement of Principles". To make the liability dependent upon the fortuitous circumstance of which vessel the seaman happens to sign on is to take the very heart out of the protection which was promised to the seamen for their benefit and for the benefit of their next-of-kin. In a series of Congressional hearings, where it was proposed to afford the merchant seaman the same benefits to war risk insurance as those accorded to the men in the Armed Forces, the Committee decided that it was unnecessary to so extend the law for the reason that it was understood that the seamen were already covered by war risk insurance. The decision of the Court below violates that understanding, as well as that of the draftsman of the "Statement of Principles" and the official interpretations of informed and qualified witnesses who appeared before the Committee.

WHEREFORE, your petitioners respectfully prays that a writ of certiorari issue out of and under the seal of this Honorable Court directed to the United States Court of Appeals for the Fourth Circuit, commanding that Court to certify and send to this Court for review and determination, on a day certain to be named therein, a full and complete transcript of the record and proceedings in the case numbered and entitled on its docket, No. 5800, Sarah Allison Painter, Administratrix of the Estate of Edwin D. Painter, deceased, Loren E. Timbs, Administrator of the Estate of John Lambert Timbs, deceased, and Leslie F. Haynie, Administrator of the Estate of Willard Tolson Haynie, deceased v. Southern Transportation Company, and that the decree of the United States Court of Appeals for the Fourth Circuit in this case may be reversed by this Honorable Court and that your petitioners may have such other and further relief in the premises as may be just,

And your petitioners will ever pray, etc.

Sarah Allison Painter, Administratrix of the Estate of Edwin D. Painter, deceased, Loren E. Timbs, Administrator of the Estate of John Lambert Timbs, deceased, and Leslie F. Haynie, Administrator of the Estate of Willard Tolson Haynie, deceased.

By ABRAHAM E. FREEDMAN,
Counsel for Petitioners.

I hereby certify that I have examined the foregoing petition, and that in my opinion it is well founded and entitled to the favorable consideration of this Court, and that it is not filed for the purpose of delay.

ABRAHAM E. FREEDMAN,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

I. THE OPINIONS OF THE COURTS BELOW.

The opinion of the District Court for the Eastern District of Virginia was rendered on January 10, 1948, and is reported in 1948 A. M. C. 1207.

The opinion of the Court of Appeals for the Fourth Circuit was rendered on November 8, 1948, and is not yet reported.

II. JURISDICTION.

1. The date of the judgment entered herein by the United States Court of Appeals for the Fourth Circuit, affirming the judgment of the District Court, is November 8, 1948.

2. This is a proceeding arising under Article 2, Section 2, Clause 1 of the Constitution of the United States, and under Article 3, Section 2 of the Constitution of the United States, and is within the jurisdiction of this Honorable Court.

3. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, C. 229, Sec. 1, 43 Stat. 938, United States Code, Title 28, Section 347 (a).

III. STATEMENT OF THE CASE.

Inasmuch as a statement of the case has necessarily been given under heading "A" in this petition, a restatement is omitted herein in the interest of brevity.

IV. SPECIFICATION OF ERRORS.

The Court of Appeals erred in the following respects:

FIRST: In holding that the "Statement of Principles" was a contract and binding upon all of the parties signatory,

when it clearly appears that it has none of the indicia of a contract and is simply a petition by labor and industry to the Government.

SECOND: In accepting as a decisive and controlling factor the interpretation of a subordinate and uninformed staff member of the Maritime War Emergency Board in preference to the considered testimony of the legislative counsel of the Maritime Commission.

THIRD: In failing to hold that the decisions of the Maritime War Emergency Board created a mandatory, compulsory obligation upon the operators of all vessels documented under the laws of the United States.

FOURTH: The decision of the Board is in direct conflict with the plain unambiguous language of the "Statement of Principles" and of the Presidential proclamation creating the Maritime War Emergency Board and vesting it with powers under the emergency powers of the President in times of war.

FIFTH: In holding that the cases of *Gulf Oil Corporation v. Lastrap, supra,* and *Jones v. Atlantic Refining Company, supra,* did not decide the issue here involved.

V. ARGUMENT.

Summary of Argument.

Immediately after the outbreak of the war, the United States Government realized the absolute necessity for the efficient and uninterrupted operation of the Merchant Marine, and accordingly, the Maritime Commission and the Department of Labor called a joint meeting of maritime labor and industry for the purpose of eliminating all of the disputes which might constitute a threat to the vessels' operations. Under the guidance of the Maritime Commission, the parties arrived at a "Statement of Principles" (Ex. 3), in which a joint request is made to the President of the United States to create a Board with the power to impose a uniform obligation for war risk insurance and war bonus to cover the "entire nation and entire industry". Pursuant to this joint request, the President issued his proclamation on December 19, 1941 (8 Fed. Reg. 3385), creating the Maritime War Emergency Board, and specifically vesting it with the powers requested in the "Statement of Principles". The Board went into action immediately and promulgated a series of orders, the very first of which imposed an obligation upon the operators of all vessels documented under the laws of the United States to furnish war risk insurance for all of the vessels' personnel. It is petitioners' contention that these orders were binding and mandatory upon all of the vessel operators, as a matter of law with the same effect as any Federal regulation or statute. This was the accepted interpretation by the Government and the industry following the promulgation of the Board's orders, and they were complied with not only by those parties who signed the "Statement of Principles", but by practically all of the shipowners who were not parties signatory.

Petitioners accordingly make the following contentions:

(1) The Statement of Principles is not a contract and could not impose any contractual obligation to provide war risk insurance.

(2) The orders of the Maritime War Emergency Board imposed a mandatory and uniform obligation upon the entire industry as a matter of law with the same effect as any Federal regulation or statute.

First Point.

The Statement of Principles Is Not in Any Sense a Contract But Is a Joint Petition to the President of the United States to Create the Maritime War Emergency Board With Governmental Powers.

The Court of Appeals found that the "Statement of Principles" was a contract between labor and industry and bound only the parties signatory to it. It is to be assumed, therefore, from this finding that the document must contain language of a character which is sufficient in itself to bind these two parties as a matter of contract. An examination of the writing in question discloses beyond any possible doubt that it is not a contract, that it does not contain any language of a character which could bind the parties. In the first place, the conference was attended by a mere handful of the shipowners engaged in the maritime industry and the signatures of the representatives even of those few companies are not affixed in a manner that would be expected in any contract. The American Merchant Marine Institute, for example, sent a representative who affixed his signature to the document, and while it is generally known that this association represents a number of shipping companies, by no stretch of the imagination could it be conceived that the signature was being affixed in behalf of the members of the association whose identities were not made known. Moreover, it does not appear that this association was signing the document

in a representative capacity. Most significantly, the very manner in which all signatures are affixed negative any suggestion that the signatories were signing a contract. What was done here is the general practice only in the signing of a petition.

It is hardly to be doubted that if the parties had intended to enter into a contract they would have employed the appropriate kind of language generally used in the drafting of an agreement. Both labor and industry were fully experienced in the drafting of contracts, and, moreover, the Government representatives from the Maritime Commission and the Department of Labor, who were in charge of the conference, were likewise well versed in legal matters and the drawing of legal papers. It is to be expected, therefore, that if the parties intended at all to enter into a contract, there would not be the slightest doubt of that intention from an examination of the paper itself. An analysis of the "Statement of Principles" discloses, contrary to the finding of the Court, that it is devoid of any language whatsoever which even remotely suggests that it is an agreement between the signatories, but is rather a joint petition directed to the President of the United States to exercise his emergency powers.

As a general rule, every agreement is identified as such either in the title or in the preliminary statement. The document under consideration is simply designated as "Statement of Principles". This designation clearly refutes any suggestion of contract and is consistent rather with a petition. The opening statement of the document outlines the objectives sought by the parties, and its very nature discloses that its accomplishment could be achieved only by the Government and not by the parties signatory. That opening paragraph provides:

> "Insofar as areas, war bonus and insurance are concerned, it is regarded as *desirable* and *necessary* that a *uniform basis* for each item *covering the entire nation and the entire industry be reached.*"

This objective could not possibly be accomplished by the handful of representatives who were present at the conference. The plain meaning of the foregoing language shows that it was intended to impose a uniform obligation upon every vessel flying the American flag, without exception. It would be ridiculous to assume that these few representatives could, by a contract between themselves, bind all those operators who were not present. The only sensible and reasonable interpretation of this clause is that the representatives present were simply indicating to the Government what it was that they wanted the President to do.

The second paragraph is likewise most enlightening, and makes clear that both parties were making an appeal to the Government:

> "2. Without waiving the right to strike, maritime labor *gives the Government* firm assurance that the exercise of this right will be absolutely withheld for the period of the war; on a voluntary basis therefore this is a guarantee on the part of labor that there will be no strikes during the period of the war. Representatives of employers in the maritime industry also guarantee there will be no lockouts for the period of the war."

This language certainly does not suggest any agreement between labor and industry, but clearly supports the view that both were appealing *to the Government* to create legal machinery for the settlement of their disputes. Both labor and industry agreed not to strike or lockout and this joint agreement or pledge was advanced to the Government. Such an agreement is clearly distinguishable from a contract, and on this point the Court below fell into error. The next paragraph of the "Statement of Principles" likewise points up the Government as the party who is looked upon to accomplish the ends sought by labor and industry, as follows:

> "3. The utilization of collective bargaining will in no instance be impaired or restricted by reason of

any action taken at this conference. It is understood and agreed that all rights guaranteed to labor and industry with respect to collective bargaining will be retained and all agreements and obligations arising as a result of collective bargaining agreements will in no way be violated. During the period of the war there shall be no limitation or curtailment of the productive or service capacities of either employer or employee."

It would be absurd to set forth such a clause in a contract between private parties, since only the Government could give the assurance which the parties here sought. This was a prerogative only of the sovereign.

The fourth and final provision of the Statement of Principles is likewise devoid of any suggestion of a contract between labor and industry, but is clearly consistent with a request or a petition to set up the machinery of the board, as follows:

"4. To provide machinery for the settlement of disputes without interruption of service or stoppage of work during the period of the war and to insure the application of the maximum war effort and coordination of all war activities coming within the purview of the maritime industry, the Maritime War Emergency Board with the powers and purposes set forth in Exhibit 'A' attached hereto, will be created."

The "Statement of Principles" thus lacks all of the criteria generally found in and necessary to a contract, and it is significant that the Court of Appeals below did not refer to any provision in the "Statement of Principles" which would support its holding. The Exhibit "A" referred to in the "Statement of Principles" further strengthens petitioners' contention that the parties were simply petitioning the President to take appropriate action for the best interests of the country. That the parties recognized that only the Government was competent to handle the situation is evidenced by the following excerpt from Exhibit "A":

"Under present war conditions, however, neither the unions nor the steamship operators will at all times be in position to obtain adequate information with regard to the extent of war risks in order to enable them to bargain intelligently with regard to questions relating to war risk compensation and insurance of the personnel of such vessels.

"In order to afford a procedure for settling questions relating to war risk compensation and insurance which will at the same time insure that the consideration thereof shall be based upon adequate and accurate information and that such questions shall be settled in such manner as shall most certainly assist in the prosecution of the war, it is proposed that there shall be established a board to be known as the Maritime War Emergency Board (hereinafter sometimes called the Board), or by some other suitable name, and to be composed and have the powers and duties hereinafter set forth.

"The Board shall consist of three members to be named by the President of the United States with the understanding that one member shall be selected from the U. S. Department of Labor and one from the U. S. Maritime Commission."

The powers and practice of the proposed Board are then outlined, as follows:

"Whenever any difference shall arise between any steamship operator and any union representing its employees with regard to any question relating to war risk compensation or war risk insurance of personnel of the vessels of such steamship operator and such question shall not be settled through the ordinary procedure of collective bargaining between such steamship operator and its employees, such question shall be referred to the Board by such steamship operator

or such union by giving written notice to the Board and to the other party of the intention of the party giving such notice to refer such question to the Board. Such notice shall specify the question to be referred to the Board.

"Upon receiving such notice the Board shall as promptly as shall be practicable afford to each party a reasonable opportunity to present evidence and argument in support of the position of such party and the Board shall thereupon render its decision in writing with regard to such question and serve a copy thereof upon each party."

In summary, the most searching analysis of the "Statement of Principles" and the Exhibit "A" fails to reveal a single provision to support the conclusion of the Court below that this document is a contract. All of the provisions, on the contrary, clearly support the view that it is simply a petition to the President to create a Board for specific purposes.

The President of the United States did create such a Board pursuant to that joint request in the form of a proclamation issued immediately after the request was submitted to him, and it is significant to note that the President not only created the Board, but he specifically endowed it with the kind of powers, which only the Government had the right to do in that emergency. The proclamation of the President is as follows:

"THE WHITE HOUSE
Washington

December 19, 1941

"Pursuant to the agreement reached on December 19, 1941, between representatives of the maritime industry and the labor organizations involved, and *in accordance with their joint request* that a Board to expedite and coordinate the war efforts of the maritime

industry to be appointed, I hereby designate: John R. Steelman of the U. S. Department of Labor; Edward Macauley, of the U. S. Maritime Commission; and Frank P. Graham, President of the University of North Carolina, to serve as members of this Board. *The Board shall be known as the Maritime War Emergency Board and its powers and purposes shall be those set forth in accordance with Exhibit 'A' of the agreement referred to above.*

(Sgd.) FRANKLIN D. ROOSEVELT"

The Court of Appeals below noted that the President, in the foregoing proclamation, referred to the "Statement of Principles" as an "agreement", but this finding clearly overlooks the plain meaning which the President attached to the use of that term. The President simply recognized by the use of that term that labor and industry had agreed not to strike or lockout, and they further agreed that the Government should take over the problems then confronting them. This construction is substantiated by the language which the President uses, that it was "in accordance with their joint request" that the Board should be created. The most significant provision of the Presidential proclamation is the statement in which the President said that the Board "shall" have the powers as set forth in Exhibit "A". If the "Statement of Principles" was a contract, as the Court of Appeals found, then it would not have been necessary for the President to endow the Board with any powers. The fact that the President did specifically and in a mandatory fashion vest the powers in the Board exclusively shows that the President was then acting under his emergency powers and was creating the Board as a Governmental agency with mandatory powers to govern the entire nation and the entire industry as both parties had requested. Thus, a review of the history and of the documents in question repels any suggestion that the parties intended to enter into a contract, or that the documents in question

constitute a contract. It is submitted that any attempt to recover the proceeds of war risk insurance upon the basis of the Statement of Principles as a contractual obligation could never be sustained in any Court of law. The parties did not intend to and did not create any agency to govern themselves, but simply requested the President to do so. That the President did so is hardly open to question. That it was within his Constitutional authority is likewise clearly evident from a review of the applicable law.

The Creation of the Board With the Powers Assigned to It Was a Valid Exercise of Power by the Chief Executive in Time of War.

There is a presumption of regularity and validity which attends all official legislative, administrative or other official action, "and the burden of proof to the contrary is upon one who challenges the action." *Proctor & Gamble Co. v. Coe,* 96 F. (2d) 518; *United States v. Chemical Foundation,* 272 U. S. 1. An examination into the President's power in time of war, removes all possible doubt as to the validity of the President's action in this regard.

The Constitution of the United States is a flexible document which is designed to meet changing times and conditions. When the welfare of the country is at stake, the Constitution affords the Chief Executive the most extraordinary powers to cope with any emergency. In times of war his powers extend to every matter and every activity related to the war. In *Weightman v. United States,* 142 F. (2d) 188, the Court said:

> " 'The war power of the national government', the Supreme Court recently said, quoting Charles Evans Hughes, War Power Under the Constitution, 42 A. B. A. Rep. 232, 238, 'is "the power to wage war successfully". It extends to every matter and activity so related to war as substantially to affect its conduct and progress.' *Kiyoshi Hirabayashi v. United States,* 320 U. S. 81, 93, 62 S. Ct. 1375, 87 L. Ed. 1774."

The most comprehensive study of the war powers of the Chief Executive was made by Professor Clarence A. Berdahl in "War Powers of the Executive in the United States." (University of Illinois Studies in the Social Sciences, Vol. IX, March-June, 1920—Nos. 1-2.) After a detailed consideration of the various phases of the President's powers, the author sums up as follows:

> "In summing up the results of this study, it may be noted again that the war powers of the President are derived principally from the Constitution. There is only one clause in the instrument, however, which expressly confers upon the President any power relating directly to war, namely, the clause which makes him Commander-in-Chief of the Army and Navy of the United States and of the militia of the several states when called into the actual service of the United States. Even the powers of the President as Commander-in-Chief are undefined in the Constitution, and hence it has been necessary to determine them more exactly by reference to international law and practice, to the statutes of the United States, to custom and usage, and to authoritative opinion."
>
> • • •
>
> "From our study of these express powers, as interpreted and applied in the various emergencies that have arisen, it may be said, in the first place, that the President, through his control of foreign relations, his powers as Commander-in-Chief, and his influence and authority as Chief Executive, may virtually compel or prevent a war, at his discretion. He may very largely influence a declaration of war by Congress, and he may even begin a 'defensive' war without such a declaration.
>
> "In the second place, it is the President, not Congress, who wages war, his military powers as Commander-in-Chief making him supreme in that respect

and solely responsible for the actual conduct of war. His constitutional powers in this regard are customarily supplemented with considerable statutory authority, so that he has large powers with regard to raising and organizing the armed forces; he directs and controls all military operations; he exercises complete powers of military jurisdiction; and he establishes and carries on military government; in fact, *when a war has been declared* or begun, *the President may do practically anything,* in a military sense, that he deems necessary to carry on that war to a successful conclusion, subject only to the rules of civilized warfare.

"Thirdly, the civil powers of the President are greatly increased in time of war over those powers in times of peace. Principally by virtue of statutory authority, but in part also by virtue of his express constitutional power of appointment and his implied powers of removal and direction, together with his authority as Commander-in-Chief, the President, during such a period of emergency, is vested with almost complete control of the administrative machinery of the government; he exercises extensive powers of police control and supervision over individual action and opinion; *he may even, as in the recent World War, practically control the economic resources of the country.*

• • •

"At least one definite conclusion can be drawn from this study, namely, the so-called 'war powers' of the Executive *constitute no isolated group of powers derived from a single source, but that they are intimately connected with and indeed derived from practically every phase of the President's authority. In general, the war powers of the President cannot be precisely defined, but must remain somewhat vague and uncertain. 'The constitution,'* says President

Wilson, *'is not a mere lawyers' document: it is a vehicle of life, and its spirit is always the spirit of the age.'* That statement is particularly true of that portion of the Constitution dealing with the war powers. The exigencies and circumstances of war can never be foreseen or provided against in advance to any appreciable extent. *Hence, the interpretation of what may actually be included within the war powers depend very largely on the gravity of the particular occasion for their exercise and the peculiar necessities that arise in connection.*

"Thus it was, for example, that the power to arm merchant ships in defense was first asserted by President Adams as the prerogative of the Executive, under the stress of the troubles with France in 1798. Likewise the power of the Executive with regard to military government in occupied territory was firmly established as a part of American constitutional law by President Polk, because of the necessities of the war with Mexico. Under President Lincoln and the stress of civil war were developed especially the powers of censorship and arbitrary arrest, and of military government over territory within the United States; while under President Wilson, probably the control exercised by the executive over the administrative machinery of the Government and the economic resources of the country are the outstanding features of the war powers as exercised during the recent World War.

"Clearly, the tendency has been toward a great increase in the war powers of the Executive as compared with those of Congress, a tendency quite inevitable when one considers the growing complexity of war, with its consequent greater need for singleness of direction, unity of command, and the coordination of every resource of the nation. * * *

* * *

"While the President, in critical times, thus becomes practically a dictator, that does not necessarily mean a disregard of the principles of constitutional government nor require further limitations of his war powers. One of the foremost students of contemporary American politics says that the ability to act promptly and energetically in the presence of emergency being of paramount importance, 'no government can survive that excludes dictatorship when the life of the nation is at stake;' and he points out that the real difference *between a despotism and constitutional government lies in the location of responsibility rather than in the limitation of power.*

"Certainly the tendency in the United States has been towards the concentration of the war powers in the hands of the Executive. More and more, however, by express legal sanction; *and more and more is the responsibility for anything in the way of Executive action being located in the President, so that, at the most, the President may be said to be in time of war, a 'constitutional dictator'.* Even so, the authority of the Executive under his war powers is so extensive that one can only repeat the words of James Bryce when he wrote about the President that 'when foreign affairs become critical, or when disorders within the Union require his intervention . . . *everything may depend on his judgment, his courage, and his hearty loyalty to the principles of the constitution.*"

A pertinent situation arose prior to our entry into the first World War when President Wilson sought to arm the merchant vessels. He was opposed by some members of Congress because the United States had not yet entered the war. The incident and subsequent events are detailed in Professor Berdahl's study as follows (p. 68):

"More recently the President's right to exercise this power of arming merchant vessels for defense

again became a sharp issue. Germany having announced the renewal of her ruthless submarine warfare, President Wilson went before Congress February 26, 1917, and asked for authority 'to arm our merchant vessels with defensive arms should that become necessary, and with the means of using them, and to employ ar other instrumentalities or methods that may be necessary and adequate to protect our ships and our people in their legitimate and peaceful pursuits on the seas.' While thus requesting express authority, the President at the same time announced that he considered himself as already possessing that authority 'without special warrant of law, by the plain implication of my constitutional duties and powers.' He said, however, that he preferred under the circumstances not to act upon such general implication, but wishes to feel 'that the authority and power of the Congress are behind me in whatever it may become necessary for me to do.'

"The bill granting the authority asked for was favored by an overwhelming majority in both houses of Congress, but was defeated by a filibuster in the Senate, the measure being opposed principally on the ground that it was a step leading to war, and therefore a delegation of the war-making power of Congress to the President. The view of this 'little group of wilful men'—as they were characterized by President Wilson in a public statement—was perhaps best expressed by Senator Stone (Missouri) when he said: 'This bill, if enacted, would confer powers upon the President to initiate war, if he should so desire or determine, and to do that supremely solemn thing without first submitting the choice of war or peace to Congress.' Regarding the President's claims to that power without express authorization, he said: 'I cannot consent that this clause (i. e., the clause of the constitution giving the President power to execute the

laws) confers, or was ever tended to confer, power upon the President to determine an issue between this nation and some other sovereignty—an issue involving questions of international law—and to authorize him to settle that law for himself, and then proceed to employ the Army and Navy to enforce his decision.'

"In spite of the failure of Congress to grant his request for express authority, President Wilson, still convinced of his own power, and *fortified not only by the known sentiments of the majority in Congress but also by the advice of his Secretary of State and Attorney-General,* gave formal notice on March 12 of his determination 'to place upon all American merchant vessels sailing through the barred seas an armed guard for the protection of the vessels and the lives of the persons on board.' Accordingly, a large number of merchant vessels were equipped with six inch guns and gunners from the United States Navy were assigned to man them, supposedly with instructions not to await an attack by a submarine, but to fire at sight, the presence of a submarine presupposing its hostile intent."

Thus, even in times of peace the President has very extensive powers when the nation's welfare is threatened and his powers extend particularly to those businesses which are affected with a public interest. This fact was considered of paramount importance in the foregoing studies (p. 204) as follows:

"The entry of the United States into the World War, requiring the mobilization, not only of the military and naval forces of the nation, but of its every economic resource as well emphasized the fact that in time of war the constitutional principle of government regulation and control may be extended to cover practically every enterprise and activity within the country; that, '*extraordinary circumstances of war*

may bring particular businesses and enterprises clearly into the category of those which are affected with a public interest and which demand immediate and thoroughgoing public regulation.' " (Statement of ex-Justice Hughes, quoted in War Cyclopedia (1st ed.) 96.)

It could hardly be disputed that the maritime industry is a business which is most vitally affected with the public interest. It has been characterized as the life-line of the nation and even in time of peace it is subject to stringent regulation by the Government. In time of war the Merchant Marine becomes a most essential instrument in the prosecution of the war. Not only does it necessarily serve the internal economy and welfare but it serves the Army and Navy by transporting men and materials to the far flung battlefronts. Unlike any other civilian industry the seamen are exposed to direct enemy action by virtue of the very nature of the business. Because of these considerations the seamen very properly demanded war risk insurance coverage for the protection of their families. Disputes then arose because of the failure to provide such coverage and it was at that point that the Government stepped in for the express purpose of preventing any interruption in the merchant service. The catastrophe which would result from any interruption in service is so evident as to require no argument. Suffice to state, however, that it was of such great importance in carrying on the war that the Government was duty bound to take affirmative action to prevent any such occurrence. The action of the President in creating the Maritime War Emergency Board was a step directly linked with the successful carrying on of the war. That the President's action in this respect bore fruit is manifested by the fact that there was not a single interruption in service during the entire period of the war. We respectfully submit that the creation of the Board and the vesting of the powers, was a valid exercise of the President's powers in time of war and was clearly justified by the circumstances.

Point Two.

The Maritime War Emergency Board Is a Federal Agency and Its Decisions Are Binding as a Matter of Law.

The Board is listed in the "Table of Federal Government Agencies," in the official United States Code Congressional Service, Vol. 8, 1943, page 10.16, as follows:

> "Maritime War Emergency Board. *Created to expedite and coordinate the war efforts of the maritime industry by President's memorandum,* Dec. 19, 1941, 8 F. R. 3382."

The Board is thus recognized as an official member of the Government's administrative agencies. Nor is there a lack of judicial authority to prove the point. In *Gulf Oil Corporation v. Lastrap,* 48 F. Supp. 947, a novel situation arose which required the court to decide the very question which is presently under discussion. There, one of the vessels of the Gulf Oil Corporation was sunk by enemy action and some of her crew were lost. Claim was made by Ida Guss as the beneficiary named by the deceased seaman. Her claim was opposed by the wife of the seaman upon the ground that Ida Guss had no insurable interest. Under the laws of Texas an insurable interest is required as a prerequisite to the recovery of any proceeds under any insurance policy. All the parties were resident in Texas, as was the decedent. It was contended that the Texas law applied and the fund should be awarded to the widow. Another important factor was that *Gulf Oil Corporation was not a party signatory to the "Statement of Principles"* and had not covered the crew by any insurance policy with any underwriter. It was, therefore, in the position of a self-insurer. There was, therefore, all the more reason for the Gulf Oil Corporation to challenge the applicability of the Board's orders, since the money would have to come out of its own pockets rather than from an underwriter. The Gulf Oil Corporation conceded that it was liable by virtue of the orders of the Maritime War Emergency Board

and thereupon filed an interpleader action bringing in both the named beneficiary and the widow. *The question then presented to the Court by the respective claimants was whether the Orders of the Board had the effect of law or whether they were in the nature of voluntary acts of the parties.* If the latter, then the Texas law would govern and the widow was entitled. If the former, then the Federal law would govern. The Court held the Board was created by the President under his constitutional authority and its orders must be construed as law. The Court's opinion considers fully the questions raised at bar as follows (p. 948):

"Kennerly, District Judge.

Moving under Presidential Order, dated December 19, 1941, creating the Maritime War Emergency Board, and under Decisions of such Board with respect to insurance for seamen, plaintiff, a Pennsylvania corporation engaged in the production, refining, distributing, and marketing of petroleum oil and its products, and in connection therewith owning and operating a number of ocean-going tank vessels, made provision for the insuring of members of the crews of its vessels, including each of its seamen, in the amount of $5,000, against loss of life due to risks of war or warlike operations. It also made provision for the payment for the loss of the personal effects of seamen, in accordance with Decision No. 3, and the Clarification of Decision No. 3.

Lucius Joseph Lastrap, Jr., a citizen of the United States and resident of Texas, and a seaman and member of the crew of the Steamship 'Gulf America,' lost his life by the sinking of such vessel on or about April 10, 1942, leaving the sum of $5,000 and such personal effects insurance in the sum of $150. Plaintiff also owed him at that time wages in the sum of $26.74.

Following the death of such seaman, plaintiff brought this interpleader suit, alleging that it had in

its possession such sum of $5,000, such sum of $150, and such sum of $26.74 (totaling $5,176.74), which it has paid into the Registry of the Court, and that defendant, Ida Guss, of Galveston County, Texas, was named by deceased as his beneficiary to receive such life insurance and such personal effects insurance, that defendant, Lillian Easton Lastrap, of Galveston County, Texas, is the surviving wife and administratrix of deceased and guardian of his three minor children, and that there is a dispute between such defendants as to whether such sums of money should be paid to Ida Guss or to Lillian Easton Lastrap. It prays that the Court decide which of the two shall receive such insurance and such wages.

There is no attack by either party on the Order of the President nor the Decisions of such Emergency Board, but in her amended answer, filed January 25, 1943, Lillian Easton Lastrap says: 'They do not know, except what is alleged in plaintiff's petition, as to Ida Guss being named as beneficiary; but these defendants allege that if Ida Guss is named as beneficiary, as alleged in complaint herein, then and in that event, these defendants say that Ida Guss has no insurable interest in the life of the deceased, Lucius Joseph Lastrap, Jr., under the laws of Texas, and, therefore, the insurance carried on the life of the deceased legally goes to the nearest of kin, to-wit, the defendants filing this answer.''

In holding that the Texas law was not applicable because the insurance did not result from the voluntary acts of the parties, but as a matter of Federal right, the Court said (p. 949):

"Invoking this rule and the rule laid down in *Griffin v. McCoach,* 313 U. S. 498, 61 S. Ct., 1023, 85 L. Ed. 1481, 134 A. L. R. 1462; Id. 5 Cir., 123 F. (2d) 550, defendant Lastrap insists that defendant Guss had no

insurable interest in the life of the deceased, and that, therefore, she cannot recover deceased's life insurance and personal effects insurance in the Registry of the Court. But not so. *Deceased's insurance did not result, as the insurance did in the cases cited, from the voluntary act of the parties, but resulted from provision made by the United States Government for seamen. Having in mind the wartime dangers to which seamen are exposed, the Government, moving under its Constitutional powers with respect to Admiralty and Maritime matters and various acts of Congress, made provision for this insurance for seamen* just as it made provision for seamen by the Jones Act, 46 U. S. C. A., Section 688, and many other similar Acts of Congress. And these provisions for seamen, all of which are rooted in the provisions of the Constitution giving to the Federal Courts Admiralty and Maritime Jurisdiction, are uniformly construed and enforced without reference to State Statutes or State Court Rulings."

* * * * * *

"It is perfectly plain that the right to the insurance on the life and personal effects of the deceased *is a right bottomed on the Admiralty and Maritime Laws of the United States, which may not be altered, affected, or controlled by the Laws of Texas or the Ruling of Texas Courts.*"

The foregoing decision meets the issue squarely and points out the inescapable fact that the Board is a Federal agency and its orders must be regarded a matter of Federal law. If the fund was created by virtue of a private agreement, or, as the Court characterized it, by a voluntary agreement of the parties, then the Texas law would be exclusively applicable, since all the parties were resident in Texas. However, the Court unequivocally held that the liability did not arise by virtue of any voluntary act of the parties but was rooted in the regulations made by the

United States Government, moving under its constitutional powers and having in mind the wartime dangers to which the seamen were exposed. The same conclusion was reached and the same reasoning followed in the case of *Jones v. Atlantic Refining Co.*, 55 F. Supp. 17, where the issue before the Court was whether the orders of the Board with regard to war bonus were binding as Federal laws. In that connection, the Court said:

> "* * * United States Maritime War Emergency Board. This Board was created by a proclamation of the President of the United States *to provide for a uniform system of war bonus and war risk insurance to govern all vessels documented under the laws of the United States.* The Court may take judicial notice of Presidential proclamations as well as Federal regulations and statutes * * *."

As the Court in the foregoing case pointed out, the law is clear that regulations emanating from the various governmental agencies and regulations prescribed by the head of any department have always been given the full force and effect of law. *Caha v. United States,* 152 U. S. 221. Courts take judicial notice of the regulations of executive departments equally with statutes. *Ex parte Reed,* 100 U. S. 13; *Wilkins v. United States,* 96 Fed. 837.

The Board was thus not only recognized by the Government itself as a governmental agency created to expedite the war effort, but the courts likewise so regarded it and gave its orders the same binding effect as any statute or other law. To allow this defendant to escape the obligation imposed by the Board would defeat the very purpose of the Board's existence and, in effect, would penalize not only the seamen, but also all those other companies who were not parties signatory but who, nevertheless, understood themselves to be governed by the law and complied therewith by paying the insurance proceeds to the beneficiaries of those seamen who were slain at sea as a result of enemy action.

The Shipowner's Obligation to Pay War Risk Insurance Under the Orders of the Board Considered to Be Mandatory Both Administratively and by the Legislative Congressional Committee.

The General Counsel of the Maritime Commission, who was most familiar with the matters at bar, testified before a Congressional Committee in unequivocal terms that the obligation for war risk insurance was a compulsory one; moreover, it was the understanding of all other related branches of the Government that all seamen were entitled to war risk insurance. The Court below declined to accept those considerations, but relied upon what it considered to be an administrative construction rendered by the Maritime War Emergency Board.

At the trial of this cause, the defendant introduced a witness who had been a member of the staff who formulated the Board's orders. This witness testified that the orders of the Board were binding only on those companies who signed the "Statement of Principles" and that the chairman of the Board, in reply to a communication, stated that the defendant here was not liable for the war risk insurance. These interpretations were not rendered in accordance with the practice as set forth in the "Statement of Principles" and which are embodied by incorporation in the President's proclamation. The witness testified that the Board members relied on the staff and it was the latter who rendered the opinions (Tr. 17—App. 38). He was one of the staff who actively participated in the decisions. An examination into his qualifications and the manner in which these decisions were rendered discloses that the witness was not competent to render an opinion on the subject and the practice which was followed was incorrect. A brief excerpt from the testimony of the staff member (who was also acting secretary) discloses that he was wholly unfamiliar with and ignorant of the Board's scope and the procedure which he was legally required to follow:

(Tr. 28—App. 39):

"Q. Mr. Butler, in order to bring before the Board any controversy, there was a formal way of doing it; isn't that correct? A. No, sir, there was no formal requirement.

Q. Did not the controversy actually have to be submitted to the Board and a hearing provided for?

A. No, sir.

Q. Do you mean you would make decisions *ex parte*? A. Yes, sir.

Q. Involving two sides? A. The Board, of course, would not make a decision on one hearing, one side of the case.

Q. Are you saying now that a hearing was not required, to afford both sides opportunity to offer evidence and argument? A. That is correct.

Q. Are you sure about that? A. Positive."

It is significant to note that the witness failed even to familiarize himself with any judicial authority (which he seemed to spurn) or with the opinions of the General Counsel of the Maritime Commission (which brought the Board into existence), or with the Congressional hearings on the subject.

(Tr. 30—App. 39):

"Q. Are you familiar with the court decisions construing the scope of the decisions of the Maritime War Emergency Board? A. No, sir.

Q. Are you a lawyer? A. Yes, sir."

• • • • • •

"Q. Mr. Butler, were you familiar with the Congressional hearings relative to the coverage of war risk insurance insofar as it applied to merchant seamen? A. I don't know exactly what hearings you have in mind. There were several sets of hearings, Mr. Freedman, with respect to that question.

Q. Do you remember the set of hearings wherein it was proposed to afford merchant seamen the same type of war risk insurance as was afforded to members in the armed forces. A. No, sir, I don't know of any such hearings.

Q. You don't know of any such hearings at all? Didn't you know that the chairman of the legislative committee of the Maritime Commission appeared and testified? A. About what time?

Q. During this early period. A. In 1942, let us say?

Q. Let us say at any time. Do you have any recollection about it at any time? A. Perhaps I am confusing what you are getting at with something else. After the war there were a series of hearings——

Q. I am talking about during the war—— A. No, sir, I have no knowledge of those.

Q. Do you know Mr. Atcheson? A. Yes, sir. He was legislative counsel of the Maritime Commission.

Q. Did you ever get his opinion on it? A. I had no occasion to.

Q. He was chairman of the legislative committee of the Maritime Commission; is that right? A. He was legislative counsel for the Maritime Commission. He had no connection with the Board of which I was a member of the staff.

Q. But he was chairman of the Board as well as legislative counsel?

A. I don't know about that. I was not employed by the Maritime Commission at that time.

Q. The Maritime Commission was primarily responsible for the meeting which resulted in the creation of the Board; isn't that correct?

A. Yes, sir."

We submit that the opinions of this gentleman, as a member of the staff, and as acting secretary of the Board, are indeed unworthy even of consideration, let alone ac-

ceptance. One would expect a man in his position to become acquainted with all of the background leading to the creation of the Board in order to intelligently render an opinion. Even more important, one would assume that he would be fully familiar with the procedure which the Board was required to follow in rendering a decision. Yet, the witness was blissfully unaware of one of the most important rules of practice, which was outlined in the "Statement of Principles" and expressly incorporated into the Presidential Proclamation. That rule provides that in the event of any difference between labor and industry with regard to war risk insurance, the issue shall be referred to the Board by either party after "written notice" to the other party and to the Board. The Board then must "afford to each party a reasonable opportunity to present evidence and argument in support of the position of such party and the Board shall thereupon render its decision in writing with regard to such question and serve a copy thereof upon each party" (Exhibit 3 App.). It is simply incomprehensible how the witness could even consider rendering any decision without following the foregoing procedure. Not only is his decision in this respect illegal and invalid but it should be rejected without consideration, if only because he did not know the rules applicable to him and he did not have the benefit of any evidence or argument in behalf of the seamen. In this same connection, it is significant to add that the defendant refrained from asking for a formal hearing. The Vice-President of the defendant company testified as follows:

(Tr. 16—App. 38):

> "Q. Mr. Paul, did you at any time ask for a formal hearing before the Board to determine this question?
> A. We did not."

It is thus clear that the problem was never presented to the Board for determination and any opinions rendered

cannot, therefore, be regarded as an opinion of the Board in any sense. Moreover, these "curbstone" opinions are repudiated by formal opinions from men in official positions.

In the early stages of the war, a number of bills were proposed in Congress to provide war risk insurance and other benefits for merchant seamen because they were exposed to the same hazards as men in the Armed Forces. The Congressional Committee conducted a series of hearings to determine, inter alia, whether these men were already covered for war risk insurance and invited first the representatives of the Maritime Commission, which had sponsored and helped to create the Maritime War Emergency Board. In this connection, the testimony of the Chairman of the Legislative Committee of the Maritime Commission rendered at the hearings in connection with H. R. 7548 is most pertinent (p. 5):

> "Mr. Welch: What security is provided for dependents of the men who lose their lives in the merchant ships? Can you give us any information on that question?
>
> The Admiral: *Mr. Ackerson, Chairman of the Legislative Committee of the Maritime Commission,* is more familiar with that than I am.
>
> Mr. Ackerson: Insurance has been provided for seamen according to the provisions of the Maritime War Emergency Board. That insurance generally covers the war risk of seamen. I must say, however, that there are one or two gaps in the protection which is afforded by the insurance and steps have been taken to correct that legislatively in H. R. 7424.
>
> Chairman: I know there is some question as to whether it is a marine risk or a war risk.
>
> Mr. Ackerson: Yes, sir.

The Chairman: Ordinarily, a marine risk, I think that question has arisen with reference to it.

Mr. Welch: To what degree are the men covered by insurance who man the Merchant Marine?

Mr. Ackerson: *I think they are fully covered insofar as insurance is concerned.*

The Chairman: Is that compulsory on all?

Mr. Ackerson: *It is required under the decisions of the Maritime War Emergency Board that seamen be covered by insurance.*

Mr. Welch: *That is mandatory.*

Mr. Ackerson: *Yes, sir.*" (Italics ours.)

It is submitted that this witness was not only competent to testify but equally important is the fact that he was in the best position to know the facts and understand the problem. If any administrative opinion is to be considered in the determination of the issue here, it should be that of the representative of the Maritime Commission who helped design and create the Board. The opinion of the witness was corroborated and fortified by the formal opinions of other branches of the Government whose views were solicited by the Congressional Committee as follows:

"Hon. S. O. Bland, Chairman,
Committee on the Merchant Marine and Fisheries.

Dear Judge Bland:

You have requested the views of the Maritime Commission on H. R. 1361, a bill to confer the same rights, privileges and benefits upon members of the Merchant Marine * * * as are conferred upon members of the armed forces. * * *

* * *

To cover risks due to war conditions and which are not ordinarily the liability of the employer, seamen are furnished war risk life and disability insur-

ance under decisions of the Maritime War Emergency Board. * * *

* * *

E. S. Land, Administrator."

The Veterans' Administration rendered a similar report to the same Committee as follows:

"* * * It is understood that *under existing law and regulations* of the War Shipping Administration members of the Merchant Marine are entitled to insurance benefits at no cost to themselves. * * *

Frank T. Hines, Administrator
Veterans' Administration.

Significantly also, the War Department, in its report to the Committee said:

"* * * *The War Department understands that existing law provides insurance and other benefits for members of the Merchant Marine and their dependents.* * * *

Henry L. Stimson,
Secretary of War."

As a consequence of the foregoing hearings, the Committee concluded that the seamen were already adequately covered for war risk insurance, and, therefore, found it unnecessary to extend the Act applicable to soldiers and sailors to include merchant seamen. It is significant that all of the governmental agencies affirmatively pointed out to the Committee that the seamen were already covered for war risk insurance under existing law, and not on the basis of some voluntary arrangement.

The seamen pledged to the Government not to engage in any strike during the war. The record shows that they fulfilled that pledged to the letter. To put the Government in the position that it never intended to impose a mandatory, uniform obligation on the entire industry would be a withdrawal from the understanding which was implicit in the arrangements between the Government and

labor and industry at the time of the original conference. Such a withdrawal would be a breach of faith on the part of the Government, and, needless to say, no such intention should be imputed. Yet that is the necessary inference from the decision of the Court below. Assuming that the "Statement of Principles" is subject to varying interpretations under these circumstances, public policy would dictate that the interpretation here urged should be adopted.

The decision of the Court of Appeals below is not only in direct conflict with the express understandings of labor, industry and the Government, but it has the effect of encouraging those vessel operators who fail or refuse to cooperate with the Government in time of dire emergency. It is not answer to say that the war is now over and the emergency is past, but the issue must be determined in the light of the circumstances under which the Presidential Proclamation was issued. The respondent here chose to send the seamen into enemy infested waters without covering his liability for war risk insurance because of the insurance premium involved. This was the same bone of contention which impelled the Government to bring labor and industry to the conference and create the Maritime War Emergency Board. The decision of the Court below would nullify all the efforts of the Government in violation of the pledges and understandings of the parties, to say nothing of giving encouragement to a vessel operator who failed to cooperate with the Government when the national security was at stake. It is therefore submitted that this case is one calling for the exercise by this Court of its supervisory powers, and, therefore, that a writ of certiorari as prayed for should be granted to the end that the judgment below may be ultimately reversed.

Respectfully submitted,

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BRIEF FOR THE RESPONDENT IN OPPOSITION.

IN THE

Supreme Court of the United States

No. 539.

October Term, 1948.

SARAH ALLISON PAINTER, ADMINISTRATRIX OF THE ESTATE OF EDWIN D. PAINTER, DECEASED, LOREN E. TIMBS, ADMINISTRATOR OF THE ESTATE OF JOHN LAMBERT TIMBS, DECEASED, AND LESLIE F. HAYNIE, ADMINISTRATOR OF THE ESTATE OF WILLIARD TOLSON HAYNIE, DECEASED, PETITIONERS,

versus

SOUTHERN TRANSPORTATION COMPANY,
RESPONDENT.

LEON T. SEAWELL,
Attorney for Respondent.

RICHMOND PRESS, INC., PRINTERS

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BRIEF FOR THE RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the District Court of the United States for the Eastern District of Virginia, is reported in 1948 A. M. C., page 1207, and is also found at pages 19-26, inclusive of the Record in this case.

The opinion of the United States Court of Appeals for the Fourth Circuit was entered November 8, 1948, has not been reported as yet, but is found at pages 52-58, inclusive of the Record.

JURISDICTION.

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on November 8, 1948. R., p. 58. The petition for *certiorari* was served upon attorneys for the respondent on January 31, 1949.

QUESTION PRESENTED.

The question involved was succinctly stated by Judge Soper, Circuit Judge, as follows:

> "The District Judge held that the rulings of the Maritime War Emergency Board were binding only on signatories to a document entitled 'Statement of Principles', pursuant to which the Board was created, and that consequently the defendant, which was not a signatory, was not bound by the Board's decision. The sole question before us is the correctness of that holding."

STATEMENT.

The Tug MENOMINEE was owned and operated by the Southern Transportation Company, and on March 31, 1942, was proceeding from Norfolk, Virginia, to a northern port with three loaded barges in tow. The three deceased seamen were members of the crew of that tug. On this voyage the tug was attacked by an enemy submarine and destroyed.

Plaintiff's actions were based upon a contention that by reason of a ruling of the Maritime War Emergency Board the defendant here was obligated to provide certain insurance for members of its crews. It ap-

pears from the record that on account of the highly emergent situation incident to the war activities, it was found necessary to attempt to secure a conference between seamen and operators so that danger of strikes and lockouts might be avoided during the period of the emergency. Therefore, a conference was called in Washington of the representatives of both these factions, at which time they drafted a request that some agency be appointed for the purpose of passing upon the various questions which would arise between labor and operators, and to provide machinery for the settlement of disputes without interruption of service or stoppage of work. This was known as "Statement of Principles", and is found at page 27 of the Record, and to it was attached "Exhibit A", which begins at page 27 of the Record and contains the signatures of all parties who were either present or represented at this conference. Acting upon this request, the President designated three men to serve as such a Board. This was on December 19, 1941, and is found at page 26 of the Record. It distinctly states that "The Board shall be known as the Maritime War Emergency Board and its powers and purposes shall be those set forth in accordance with Exhibit A of the Agreement referred to above".

The Southern Transportation Company was not invited to this conference, nor was it present, nor did it authorize anyone else to act for it. It was not until sometime later through another medium that they heard of the conference and of the designation of the members to act as a Board. Promptly upon receiving this information they communicated with the Board to ask if they were included, and received a reply from the Chairman of the Board that they were not covered by it unless they came in as one of the signatories. This determination by the Board appeared several times, and the Southern Transportation Company at the time of the sinking of the MENOMINEE had not become a signatory to the Agreement.

ARGUMENT.

The District Court after hearing the evidence by the witnesses in person and listening to the arguments of counsel, and having the benefit of the notes of authority of counsel, decided that there was no obligation upon the Southern Transportation Company under this Agreement and filed a very full findings of fact and conclusions of law which took the place of an opinion, and we refer this Honorable Court to this memorandum by the District Judge as being well expressed and quite dispositive of the issue here. What plaintiffs are attempting to do is to impose a liability upon the employer for a failure to comply with an Agreement or request joined in by a number of operators and labor unions. We contend earnestly that no person can be obligated to conform to such result without being a party to the original Agreement. In fact, as in this instance, the defendant was one of those not even invited to the conference.

From the very beginning the War Emergency Board itself recognized the restriction upon their authority, and that they had no jurisdiction whatever upon those who were not signatories. On January 9, 1942, after the Southern Transportation Company had gained information of such a conference held in Washington in December, they wrote to Mr. Macauley, the Chairman, as follows:

> "We have been informed that your Board made a decision requiring owners of merchant vessels documented under the laws of the United States to place insurance on each member of the crew of any vessel insuring against loss of life due to risk of war or war-like operations in the amount of $5,000 on all voyages, the same to be retroactive to Sunday, December 7th. We have been unable to determine whether this applies to barges and tugs operating on the Atlantic Coast to Norfolk, New York, and

Long Island Sound ports, or whether it is certainly intended to apply to vessels operating to war zones." (Def. Exhibit No. 1.)

Not receiving any answer, on January 19, the Southern Transportation Company addressed another letter to the Board asking for a prompt reply. (Def. Exhibit No. 2.)

The Southern Transportation Company then received a telegram from the Board, filed as Def. Exhibit No. 3, as follows:

"Relet January 9th decisions of Board respecting insurance and war risk compensation binding only upon signatories to Statement of Principles. Inasmuch as your organization was not represented at meeting at which Statement of Principles was adopted, it is not obligated to abide by decisions of Board. Am forwarding you copies of Statement of Principles and Board's decisions 1-5 inclusive."

Signed by EDWIN MACAULEY,
Chairman Maritime War Emergency Board.

By letter of January 31, 1942, Mr. Macauley, as Chairman, confirmed the substance of the above telegram. See Def. Exhibit No. 4.

There was also filed in evidence, as Def. Exhibit No. 5, a bulletin from the Atlantic Coast and Gulf of Mexico Towboat Association, being bulletin No. 507, which was received by the Southern Transportation Company in which there is quoted a similar telegram from Mr. Macauley, as Chairman, advising them that only signatories were bound by the decisions of the Board, and this was circularized.

So we have at the very begining of the whole proceeding the statement made by the Board, through its Chairman, of a recognition by it that only signatories were bound, and this was addressed not only to the

Southern Transportation Company, but to the Towboat Association so that this information might be sent out to its various members.

And the reason for not inviting these towboat employers is quite obvious. There had been no attack upon any tug or barges by the enemy submarines on the Coast, and as a matter of fact it was shown in the evidence of the companion cases that this was the first, and I think the only, occasion of such an attack. Towboats and barges were hardly worth the time and ammunition for sinking them. It was the larger craft engaged in carrying supplies in connection with the war effort that were the objects for destruction. This being so, there was no particular risk in this type of coastal or even intra-coastal trade.

In the second paragraph of the Statement of Principles the agreement by labor to withhold the exercise of its right to strike was "on a voluntary basis". Correspondingly the representation by the employers that there would be no lockouts was made.

By "Exhibit A" attached to the Statement of Principles it is suggested that the Board, consisting of three members, be named by the President, and that whenever any difference arises between operator and union which cannot be settled through the ordinary procedure of collective bargaining, such question should be referred to the Board by procedure therein referred to. Upon receiving such notice the Board shall give notice, hold a hearing and render its decision, and such decision is to be final and binding.

On December 22nd at 11:50 P. M. the Maritime War Emergency Board handed down its "Decision No. 1" in which it set forth the necessity for operators taking out war risk insurance upon members of its crews. It specifically stated from the very inception of this decision that it applied only to vessels documented under the laws of the United States "and covered by the Statement of Principles" (Appellant's Appendix, p. 62).

On February 6, 1942, the Board handed down its supplement to Decision No. 1 in which it suggested a form of policy to be used, and again in the second paragraph of that supplement it referred to those "covered by the Statement of Principles".

Later the Board handed down its Decision No. 2 and then a "Clarification of Decision No. 2". In that clarification it set forth various questions which had arisen as to the application and methods of procedure under the Board's rulings, and we quote the following from the ruling of the Board, as follows:

> "Q. No. 3—Who is bound by Decision No. 2 of the Maritime War Emergency Board? Answer: The decisions of the Board are binding only on the signatories to the Statement of Principles. The board considers that compliance with decisions by owners and operators or employees of the merchant marine not signatories to the Statement of Principles is not compulsory. The Board invites attention, however, to the following statement in Decision No. 2: 'All owners and operators of United States flag vessels of the American Merchant Marine and all licensed and unlicensed personnel employed on those vessels are expected to conform to this decision.'"

This ruling was signed by all three of the Board members, and is a definite, concrete and final decision of the Board as to who is bound by its decisions.

At the trial of these cases in the United States District Court plaintiffs first took the position that any ruling of the Board was binding upon us. However, when it was pointed out to the Court that in this clarification there was contained the above quoted ruling by the Board, plaintiffs then shifted their position and abandoned the idea that we were bound as a matter of law. However, the appellee here is protected in either event. First, as a matter of agreement it was not a

party, and was not invited to become a party. Second, if it is the ruling of the Board which governs then that ruling is in its favor, as above quoted.

Appellant attempts to avoid this ruling by saying that Decision No. 2 referred especially to the question of bonus. We point out, however, that the clarification answered numerous questions other than concerning bonus and definitely stated, not for any one purpose, but for all purposes who were bound.

At the trial below defendant produced Mr. J. G. Butler as a witness. He was a staff member of the Board and then acted as Secretary for the Board. He produced from his records the original orders and rulings of the Board which were introduced into evidence and copies made. At page 27 of the evidence he stated:

> "Q. Now, Mr. Butler, did the Maritime War Emergency Board attempt to exercise any jurisdiction over anyone who was not a signatory to the original Statement of Principles * * * ? A. No, it did not."

He also introduced in evidence a letter received by Mr. Macauley from Honorable S. Otis Bland, a member of the House of Representatives, dealing with a matter arising with reference to a claim in connection with the sinking of the Tug MENOMINEE, and also copy of letter, dated August 31, 1944, signed by Mr. Macauley, as Chairman, addressed to the Honorable S. Otis Bland, answering this letter. This answer was filed as Defendant's Exhibit 9, and from which we quote as follows:

> "This will acknowledge the receipt of your letter dated August 21, 1944, together with enclosures from Mr. Forrester Hancock addressed to Congressman Mansfield of Texas, concerning Mr. Johnnie Mitchell Bennett who lost his life at sea following the sinking of the Tug MENOMINEE due to enemy action.

"As the Southern Transportation Company, Inc., Norfolk, Virginia, the owners of the Tug MENOMINEE, on which the deceased served at the time of his death were not signatories to the Statement of Principles dated December 19, 1941, they were under no obligation to insure the complements of their vessels, unless they were under charter to the War Shipping Administration.

"Under the circumstances, and as the Tug MENOMINEE was not under the control of the War Shipping Administration at the time of the disaster, there seems to be nothing we can do to assist Mr. Hancock in this matter."

Here, again, is another evidence from the Chairman of the Board himself as late as 1944 that only signatories were bound.

Appellants contend that there should have been some formal hearing held with notice and arguments before any ruling could validly be made. We call attention to the fact that there was never any dispute between the parties as to this particular ruling, and there was no occasion at any time for a hearing. No point was ever made as to any attempt to hold those who were not signatories until sometime after the shelling and sinking of the Tug MENOMINEE when actions were brought for damages as well as these civil actions for war risk insurance. There was no occasion for any hearing, no seamen's union or anyone else ever questioned either the correctness or the legality of the ruling, and it had been accepted by all concerned.

Appellant has also referred to various statements made before a Congressional Committee inquiring into the general question of the welfare of the seamen. Undoubtedly what all of those participating in the hearing had in mind was the usual and ordinary vessel sailings into war zones where risk would be incurred. I do not find in any of the quotations any reference to a mere coastal tug and barge. As far as we have ascertained

all steamship operators employing vessels in the war zones were signatories to the Agreement, either directly or through their associations and, therefore, the information given at the hearing by representatives either of the Maritime Commission or of the Maritime War Emergency Board was directed to the immediate point. This allusion, therefore, to the Congressional hearings which were conducted quite sometime after the Agreement has no point especially when we read those quotations in the light of the surrounding circumstances.

Appellants take the position that this was a proclamation by the President of the United States, that it was all inclusive, that it bound the Southern Transportation Company as well as the signatories to the Agreement and that the President's appointment cannot be questioned.

In the first place this position ignores the fundamental basis for the appointment which was not an action by the President himself, but a form of agreement entered into by specific unions and operators making a request that a Board be appointed to handle various items that may come up by way of dispute and for the better regulation of ocean transportation during the period of the war. This matter of request and the matter of those who joined in the request was always recognized not only in the statement by the President, but in all of the rulings and decisions of the Board itself. No one ever went beyond the statement that it only applied to those "covered by the Statement of Principles".

Now as to the weight to be given to the Presidential statement. It is found at page 54 of appellant's appendix. That action of the President was not based upon any constitutional authority or by virtue of any Act of Congress. We should bear this strictly in mind in all considerations. By its own language the Board is appointed "*pursuant to the Agreement* reached December 19, 1941, between representatives of the Mari-

time Industry and the labor organizations *involved*". Here, in the very first clause of the President's statement we have the reason for his appointing the Board, and, second, that it pertains to the representatives of the Maritime Industry and the labor organizations *involved*". It was not a matter of Congressional action, nor was it a matter that came within the purview of any existing statute. It was merely that he, as President, was asked to name a Board to carry out the agreements reached by the *parties "involved"*. They could just as well have had the Secretary of Commerce or the Secretary of Labor, or any other heads of departments do the same thing. And the second part of this first paragraph again refers to the foundation for the statement, "In accordance with their joint request". It is not an action on the President's initiative, but merely responding to the request of certain parties to an agreement, he states: "I hereby designate." The last sentence of the statement gives a name to the Board and specifically states, "Its powers and purposes shall be those set forth in accordance with Exhibit A of the Agreement referred to above."

The District Judge, in speaking upon this phase of the case, said as follows, and we quote at some length because we think that the language of the conclusion as written by the Judge is particularly pertinent:

> "The plaintiffs refer to the setting up of the Board as the action of the Government under wartime powers and cite the case of *Gulf Oil Corporation* v. *Lastrap*, 48 Fed. Supp. 947, and *Jones* v. *Atlantic Refining Company*, 55 Fed. Supp. 17, in support of their contention. No other cases bearing upon the subject have been brought to my attention.
>
> "Upon an examination of the opinions cited, it is readily apparent that the question here involved was not before the Court in either of those cases. The question involved in the Gulf Oil case was whether a beneficiary without insurable interest in

the life of the deceased seaman was entitled to recover in preference to one with an insurable interest. In the Jones case the question in issue was whether the verdict of the jury was excessive in the allowance of damages under the Jones Act. Apparently in neither case was any question raised similar to the one now before the Court. It is not clear whether the defendants in those cases were signatories to the Statement of Principles nor whether the vessels were under charter to the War Shipping Administration. It is not necessary to discuss further the difference in the facts, but even a casual examination discloses that neither of those cases is any authority for the question here in issue.

"No applicable legislative act has been brought to my attention, nor have I been able to find one. I have examined the Merchant Marine Act of 1936 with special reference to the sub-division entitled 'Insurance (Title 46, Sections 1128, 1128(h), inclusive, U. S. C. A.), and I find nothing there to support the claims here asserted.

"In appointing the Board members the President made no reference to any authority conferred upon him either by Congres or by the Constitution. There is no suggestion that the conference was called pursuant to any congressional authority."

The action of the President not being founded upon any authority under his war-time powers or conferred upon him by either Congress or the Constitution was not, therefore, a legal action by the Government with the effect of being binding upon everyone, whether included in the original agreement, or not. In this connection, therefore, appellant is in this dilemma:—Either the Southern Transportation Company is not included as a signatory, in which event there was no obligation upon it by agreement to furnish war risk insurance, or, they are bound by the rulings of the Maritime War Emergency Board to the effect that this particular class of transportation is not included. In either event, the Southern Transportation Company is not liable.

CASES CITED BY PETITIONERS.

The only two cases cited by petitioners which were really pressed before the District Court and Circuit Court of Appeals are *Gulf Oil Corporation* v. *Lastrap*, 48 Fed. Supp. 947, and *Jones* v. *Atlantic Refining Company*, 55 Fed. Supp. 17. These cases, however, really do not touch the principle which is here involved. The District Judge in his opinion stated:

> "Upon an examination of the opinions cited it is readily apparent that the question here involved was not before the Court in either of those cases."

Judge Soper in the Appellate opinion, referring to these two decisions, states:

> "Plaintiffs also rely on the decisions in *Gulf Oil Corp* v. *Lastrap*, D. C. S. D. Tex., 48 F. Supp. 947, and *Jones* v. *Atlantic Refining Co.*, D. C. E. D. Pa., 55 F. Supp. 17, but in these cases applicability of the decisions of the Maritime War Emergency Board was conceded, so that the point involved in the case at bar was not raised."

We think that the opinions of these two courts sufficiently answers these main authorities of petitioners. However, petitioners cite six other cases, not bearing upon this point, but bearing upon the binding effect of any order entered by a duly authorized agency of the Government. Here it is pertinent to point out that in each of the cases cited by petitioners there was a direct authority from Congress for the appointment of the agency, with the powers of such agency duly prescribed, whereas in the present case there was no such appointment. These cases have no bearing upon the question under discussion here.

REASONS FOR NOT GRANTING A WRIT.

Respondent alleges the following as compelling reasons for not granting a writ in this case:

(1) The decisions both of the District Court and the United States Court of Appeals for the Fourth Circuit are plainly right and should not be disturbed.

(2) If the decisions of the Maritime War Emergency Board are binding then, as found by Judge Soper in the Appellate Court decision, the clarification by the Board itself is binding upon petitioners, and is adverse to them.

(3) There is no new or novel point of law involved, or any matter of general interest.

(4) There is no conflict of decision.

(5) At most it would only be a moot question applicable to an isolated case. This claim arose under the terms of an agreement which has long been fulfilled by the signatories thereto; the War Emergency Board created thereunder has long since been dissolved; as far as we can ascertain there has never been any other claim of a similar nature, nor could there now be, so that no general interest can possibly exist.

CONCLUSION.

The decisions below are clearly correct and for the reasons assigned we submit that the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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